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Supreme Court, U.S.
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In The
Supreme Court of the United States

CLAUDE M. BALLARD, ET UX.,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ESTATE OF BURTON W. KANTER, ET AL.,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Writ Of Certiorari To The United States Courts Of Appeals For The Seventh And Eleventh Circuits

BRIEF OF *AMICA CURIAE* PROFESSOR LEANDRA LEDERMAN IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICA CURIAE*

Amica is a professor of tax law with a long-standing interest in the operation of the United States Tax Court ("Tax Court") and its role in the federal system. She has written extensively on tax procedure, with an emphasis on issues relating to the Tax Court. She is co-author of *Tax Controversies: Practice and Procedure* (2d ed. 2002) and served as General Editor of *Federal Tax Practice and Procedure* (2003).[1]

SUMMARY OF THE ARGUMENT

One of the questions in this case is whether the Tax Court effectively can shield from appellate review the work of its Special Trial Judges in the largest cases over which those judges preside, cases heard under Tax Court Rule 183. Internal Revenue Code § 7482(a) provides, in relevant part, that "[t]he United States Courts of Appeals . . . shall have exclusive jurisdiction to review the decisions of the Tax Court . . . in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury . . . ." I.R.C. § 7482(a)(1). The Tax Court's current practice of keeping the reports of Special

[1] Pursuant to this Court's Rule 37.3(a), *amica curiae* is filing this brief with the written consents of all of the parties, which are being submitted with this brief. Pursuant to this Court's Rule 37.6, *amica* states that this brief was not authored in whole or in part by counsel for any party. *Amica* received no monetary contribution to the preparation or submission of this brief apart from the general financial support of the two academic institutions with which she is affiliated. The views expressed in this brief are those of *amica* and do not necessarily reflect the views of either institution.

Trial Judges in Rule 183 cases out of the record on appeal violates this statute because it renders the United States Courts of Appeals incapable of reviewing Tax Court decisions "to the same extent" as bench trials in the district courts.

ARGUMENT

In the Tax Court trial that gave rise to this appeal, the court assigned one of its Special Trial Judges ("STJs") to try the case. *See Investment Research Assoc. v. Commissioner*, 78 T.C.M. (CCH) 951 (1999) (Tax Court opinion below, reflecting assignment to Special Trial Judge D. Irvin Couvillion). STJs are inferior officers of the United States. *Freytag v. Commissioner*, 501 U.S. 868, 881-82 (1991). By statute, the Chief Judge of the Tax Court is authorized to assign to STJs any Tax Court proceeding, I.R.C. § 7443A(b), but the STJ may not "make the decision of the court" in cases in which more than $50,000 is placed in dispute, I.R.C. § 7443A(c); *see also Freytag*, 501 U.S. at 875 n.3.

In Tax Court Rule 183, the Tax Court has prescribed procedures for the conduct of these large cases. *See* Tax Ct. R. 183. Under that rule, the STJ conducts the trial, after which, the parties submit briefs. Tax Ct. R. 183(a). Rule 183 also provides that "[a]fter all the briefs have been filed by all the parties or the time for doing so has expired, *the Special Trial Judge shall submit a report, including findings of fact and opinion*, to the Chief Judge . . . ." Tax Ct. R. 183(b) (emphasis added). Thus, in a large case heard by a STJ, it is the STJ who makes findings of fact and

writes an opinion, both of which are reflected in a report submitted to the Chief Judge of the Tax Court.

Tax Court Rule 183 further mandates that *"[d]ue regard* shall be given to the circumstance that the *Special Trial Judge had the opportunity to evaluate the credibility of witnesses*, and the *findings of fact recommended by the Special Trial Judge shall be presumed to be correct."* Tax Ct. R. 183(c) (emphasis added). Yet, the Tax Court's current practice is to shield the STJ's report from the eyes and oversight of even a reviewing Court of Appeals. *See* Leandra Lederman, *Transparency and Obfuscation in Tax Court Procedure*, 102 Tax Notes 1539, 1540 (Mar. 22, 2004).

The Tax Court's current practice of keeping STJ reports confidential reflects a change from its prior procedure; through 1983, the applicable Tax Court rule both expressly required a copy of the STJ's report to be served on each party and provided the parties with an opportunity to file exceptions to the report. *See* Tax Ct. R. 182(b), (c), 60 T.C. 1149 (1973) (repealed 1984). "There is no public indication why the Tax Court rules and procedures were changed in 1983 to the current system . . . ." *Estate of Kanter v. Commissioner*, 337 F.3d 833, 879 (7th Cir. 2003) (Cudahy, J., concurring in part and dissenting in part). Moreover, this "abandon[ment] [of] a transparent process" reflects "an evolution completely counter to the trend towards transparency in analogous areas of the law." *Id.*

The Tax Court is a creature of statute, see I.R.C. § 7441, and Congress has provided that "[t]he Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title [and other specified statutes]." I.R.C. § 7442. Congress has delegated to the Tax Court the task of promulgating rules of practice and procedure for

the conduct of its proceedings, both generally and with respect to STJs. *See* I.R.C. §§ 7443A(a), 7453. However, the Tax Court does not write its rules in a vacuum. "[The Tax Court's] authority under 26 U.S.C. § 7453 . . . is limited to maintaining control over the court's own docket and proceedings." *Daccarett-Ghia v. Commissioner*, 70 F.3d 621, 625 (D.C. Cir. 1995); *cf. Board of Tax Appeals v. United States*, 37 F.2d 442, 443 (D.C. Cir. 1929) ("The Commissioner . . . must be given an opportunity to be heard, and no rule of the Board [of Tax Appeals] can deprive him of the statutory right thus conferred.").

Sections 7443A and 7453 of the Internal Revenue Code do not grant the Tax Court the authority to regulate the conduct of other courts, such as the Courts of Appeals. Congress has specifically provided that "[r]ules for review of decisions of the Tax Court shall be those prescribed by the Supreme Court under section 2072 of Title 28 of the United States Code." I.R.C. § 7482(c)(2). Thus, Tax Court rules, such as Rule 183, cannot determine how the Courts of Appeals review decisions of the Tax Court and should not be interpreted so as to limit the scope of that review.[2] Instead, rules that this Court has promulgated under 28 U.S.C. § 2072 and applicable federal statutes must govern that review.

The key statute governing review of Tax Court decisions is § 7482. It provides the United States Courts of Appeals with jurisdiction to review decisions of the Tax

[2] Current Tax Court Rule 183 does not forbid disclosure of the STJ's report; the provisions mandating that disclosure were removed but not replaced with any prohibition of the prior practice. *See* Tax Ct. R. 183 & note on amendments to rule, 81 T.C. 1069-70 (1983).

Court "*in the same manner and to the same extent as decisions of the district courts* in civil actions tried without a jury . . . ." I.R.C. § 7482(a)(1) (emphasis added). As discussed below, this statute requires the STJ's report to be included in the record on appeal, both because that report cannot otherwise be accorded the weight required by law and because, in district court, the original findings of fact and opinion are included in the record on appeal, even if those findings and opinion are those of a judicial officer rather than a judge.

I. THE SPECIAL TRIAL JUDGE'S REPORT MUST BE INCLUDED IN THE RECORD ON APPEAL IN ORDER FOR THE ORIGINAL FINDINGS OF FACT OF THE TRIAL JUDGE TO RECEIVE THE REVIEW REQUIRED BY LAW

This Court has interpreted § 7482(a)(1) as requiring Tax Court decisions to receive the same standard of review as district court decisions, so that Federal Rule of Civil Procedure 52(a) applies to review of Tax Court decisions. *See Commissioner v. Duberstein*, 363 U.S. 278, 291 & n.13 (1960) (*citing Grace Bros., Inc. v. Commissioner*, 173 F.2d 170, 173 (9th Cir. 1949)). Federal Rule of Civil Procedure 52(a) provides, in part that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and *due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses*." Fed. R. Civ. P. 52(a). Thus, in Tax Court, as in district court, findings of fact are subject to review on appeal and the appellate court must give "due regard" to the trial court's opportunity to observe the witnesses and thereby make credibility assessments.

In Rule 183 cases, it is the STJ who is the original finder of fact and who observes the witnesses. In order for the due regard and clearly erroneous standards of Federal Rule of Civil Procedure 52(a) to be complied with, the STJ's report must be included in the record on appeal. Otherwise, the Courts of Appeals could be put in the untenable position of unwittingly upholding, as not clearly erroneous, findings that were not those of the trial judge. Similarly, the Courts of Appeals could unwittingly respect credibility determinations that were not those of the judge who observed the witnesses.

> If the appellate judges who review for correctness are denied information they would otherwise consider, if information is transmitted to them in a form which inhibits full perception of an important aspect of the case, or if the information is skewed, even the best-focused scrutiny will be misdirected and the most genuine consensus may rest on this misconception.

Robert S. Thompson & John B. Oakley, *From Information to Opinion in Appellate Courts: How Funny Things Happen on the Way Through the Forum*, 1986 Ariz. St. L.J. 1, 11 (1986); *cf. Dayton Board of Education v. Brinkman*, 443 U.S. 526, 534 n.8 (1979) (agreeing with dissenting Justice Stewart "that there is great value in appellate courts showing deference to the fact-finding of local trial judges.").

In addition, any approach other than including the STJ's report in the record on appeal would lead to different types of review under Federal Rule of Civil Procedure 52(a) depending on whether a Tax Court judge or STJ is the trier of fact. That is, if a Tax Court judge hears the case, the Court of Appeals will have in the record the

findings of fact of the trier of fact and can uphold them unless clearly erroneous and give due regard to that judge's opportunity to observe the witnesses. By contrast, if the STJ's report in a large case is not included in the record on appeal, the original findings of fact and credibility determinations of the STJ will not be available to the Court of Appeals.

This is not an infrequent issue, given that Judge Cudahy found over 880 Tax Court decisions since 1983 that involved a STJ report. *See Estate of Kanter*, 337 F.3d 833, 876 (7th Cir. 2003) (Cudahy, J., concurring in part and dissenting in part). In addition, STJs may be assigned large cases that are very fact-intensive. *See Freytag v. Commissioner*, 501 U.S. 868, 872 n.1 (1991) (describing the case as one that "involved one of the longest trials . . . in the tax court's history – 14 weeks of evidence, complex financial testimony, 9,000 pages of transcripts, 3,000-plus exhibits."). In fact, the Tax Court trial below, "consumed 28 days of trial time. There were 55 government witnesses. The transcript exceeded 5,000 pages." Cornish F. Hitchcock, *Public Access to Special Trial Judge Reports*, 93 Tax Notes 403, 404 (Oct. 15, 2001). Furthermore, it is the Chief Judge of the Tax Court who decides which large cases to assign to STJs, I.R.C. § 7443A(b), so the selection of cases for this procedure is not random. Assignment also is not subject to party consent. Given this context, a system that shields from Court of Appeals review the initial fact-finding in large cases presided over by STJs provides an unhealthy incentive for the assignment to STJs of controversial or fact-intensive cases.

Furthermore, Tax Court Rule 183 has its own "due regard" provision, applicable to the Tax Court. It provides that "[d]ue regard shall be given to the circumstance that

the Special Trial Judge had the opportunity to evaluate the credibility of witnesses, and the findings of fact recommended by the Special Trial Judge shall be presumed to be correct." Tax Ct. R. 183(c). In order for this rule to be enforceable, the STJ's report must be included in the record on appeal.

As this Court has stated:

> the trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road.'" *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). For these reasons, review of factual findings under the clearly-erroneous standard – with its *deference to the trier of fact* – is the rule, not the exception.
>
> When findings are based on determinations regarding the *credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings*; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.

Anderson v. Bessemer City, 470 U.S. 564, 575 (1985) (emphasis added). The only way for a Court of Appeals to accord *any* deference at all to the findings of fact and credibility determinations of the trial judge in a Rule 183 case – or to evaluate whether the Tax Court has given proper regard to the STJ's position as trier of fact under its own rule – is for the STJ's report to be included in the record on appeal.

II. BECAUSE CONGRESS HAS PROVIDED FOR REVIEW OF TAX COURT DECISIONS TO THE SAME EXTENT AS DISTRICT COURT DECISIONS AND BECAUSE THE RECORD ON APPEAL IS A CRITICAL PART OF THAT REVIEW, THE FINDINGS OF FACT AND CONCLUSIONS OF THE TRIAL JUDGE, WHICH WOULD BE INCLUDED IN THE RECORD ON APPEAL OF A DISTRICT COURT TRIAL WITHOUT A JURY, CANNOT BE EXCLUDED FROM THE RECORD ON APPEAL OF A TAX COURT CASE

As noted above, § 7482(a) provides, in relevant part, that "[t]he United States Courts of Appeals . . . shall have exclusive jurisdiction to review the decisions of the Tax Court . . . in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury . . . ." I.R.C. § 7482(a)(1). This section was enacted in 1948 to overturn the holding of *Dobson v. Commissioner*, 320 U.S. 489 (1943), which had interpreted then-existing law, including the predecessor of § 7482(c)(1), as allowing only limited review of Tax Court decisions. *See* S. Rep. No. 80-1559, at 13 (1948); Harold Dubroff, *The United States Tax Court: An Historical Analysis* 381-82, 386 (1979).

The history of § 7482(a)(1) reflects Congress' intent to provide for appellate review of Tax Court (then Board of Tax Appeals) decisions that was no more limited than review of district court decisions, at least on questions of fact. A Senate Report refers to the provision as repealing the *Dobson* rule and thereby "mak[ing] decisions of the Tax Court on questions of fact reviewable if clearly

erroneous, as is now the case with similar decisions of the district courts," S. Rep. No. 80-1559, at 13 (1948), while the Committee on the Judiciary spoke more broadly:[3]

> From the time . . . appellate review [of Tax Court decisions] was established by the Revenue Act of 1926 until the *Dobson* decision in 1943, there had been no suggestion that the review of the Tax Court decisions was any more limited than the appellate review of decisions of the United States District Courts. . . . The Supreme Court in the *Dobson* case, however, created a new rule of law which would not permit even law questions to be reviewed unless they were clear-cut questions of law, and which would not permit any worth-while review of decisions of fact. . . .
>
> [The provision in the Senate bill] *restores to the circuit courts of appeal the power to review cases from the Tax Court in the same manner and to the same extent as it has power to review other cases* – whether tax cases or nontax cases

[3] In part because of ambiguity in the legislative history and in part because Congress retained the language of what is now § 7482(c)(1), which empowers a Court of Appeals to modify or reverse the Tax Court's decision if it "is not in accordance with law," there has been academic commentary to the effect that "[a]t a minimum . . . the language and history of the 1948 amendment leave the door open for the courts to construe the amendment as limited to providing a new standard for review of factual issues ('clearly erroneous') while retaining the *Dobson* standard for legal issues (entitled to 'great deference')." David F. Shores, *Deferential Review of Tax Court Decisions:* Dobson *Revisited*, 49 Tax Law. 629, 653 (1996). Nonetheless, "[f]or approximately the last 50 years, Tax Court decisions on questions of law have been subject to de novo review by the court[s] of appeals . . . ." David F. Shores, *Deferential Review of Tax Court Decisions: Taking Institutional Choice Seriously*, 55 Tax Law. 667, 667 (2002).

> – coming from a District Court in a case tried without a jury.

Views of the Committee on the Judiciary with Respect to Senate Amendments to H.R. 3214, reprinted in 94 Cong. Rec. 8501 (1948) (emphasis added); *see also Commissioner v. Duberstein*, 363 U.S. 278, 291 n.13 (1960) ("The purpose of the 1948 legislation was to remove from the law the favored position (in comparison with District Court and Court of Claims rulings in tax matters) enjoyed by the Tax Court under this Court's ruling in *Dobson v. Commissioner*, 320 U.S. 489.").

As the history of § 7482(a)(1) shows, it is a provision with substantive content. It is intended to provide both for meaningful appellate review of Tax Court decisions and for a particular kind of appellate review – review comparable to that afforded decisions in civil bench trials in district court, particularly on factual questions. In fact, this Court has cited § 7482(a) as requiring application of the "clearly erroneous" standard of review of Federal Rule of Civil Procedure 52(a) on appeal from Tax Court decisions, *Duberstein*, 363 U.S. at 291 & n.13, as discussed above, and in support of the important principle that "[t]he Tax Court's function and role in the federal judicial scheme closely resemble those of the federal district courts," *Freytag v. Commissioner*, 501 U.S. 868, 891 (1991).

A. The Contents of the Record on Appeal are Key for Appellate Review

Appellate review of the decision of a trial court is based on the record on appeal. *See* 20 *Moore's Federal Practice* § 310.02[1] (3d. ed. 1997) ("The contents of the

record as it is presented to the circuit court determine and limit the issues that may be addressed on appeal."); Cora M. Thompson, *Cyclopedia of Federal Procedure* § 61.02 (rev. 3d ed. 1994) ("A written or printed record is the basis of all ordinary modes of review by a higher court. Barring matters of which the court may take judicial notice, consideration of the court of review is confined to the record which is filed in the particular case.") (footnotes omitted); *Abatino v. United States*, 750 F.2d 1442, 1445 (9th Cir. 1985) ("The Court of Appeals' review of a District Court's order must be made on the basis of the record on appeal, which comes up from the district court.").

Thus, the contents of the record on appeal determine the parameters of appellate review. *Cf. Jackson v. United States*, 131 F.2d 606, 607 (8th Cir. 1942) ("In addition to the record on appeal, we have been furnished by the Government with certain documents explanatory of what occurred in the court below. We cannot, of course, concern ourselves with anything which does not appear in the record."); *cf. Hughes v. Wendel*, 317 U.S. 134, 134 (1942) (*per curiam*) (dismissing appeal where "[t]he record . . . [did] not set forth appellant's lease, and the incomplete summary of it contained in her pleading [was] not adequate to enable [the Court] to determine what her rights may be."); *James Petroleum Corp. v. Commissioner*, 331 F.2d 344, 346 (10th Cir. 1964) ("The Internal Revenue Code of 1954, § 7482, states that the Court of Appeals shall review the decisions of the Tax Court in the same manner and to the same extent as the decisions of the District Courts. This requires complete findings of fact to demonstrate the basis for decision.").

> The appeal record is virtually as old as the appellate process itself. Unless the appellate court is to act de novo and disregard all that went on in the trial court, *it is essential that the appellate court be able to determine what occurred in the trial court.* This is particularly important when the purpose of appellate review is, as it is in most appeals, error correction . . . .
>
> The effect of [various rules regarding the record] is to make *the record on appeal crucial to the appellate process.*

Robert J. Martineau, *Modern Appellate Practice: Federal and State Civil Appeals* § 8.1 (1983) (footnotes omitted); *cf. Commissioner v. McCoy*, 484 U.S. 3, 6 (1987) (citing § 7482(a) and (c)(1) and stating, "[i]t follows that in reviewing a Tax Court decision, the duty of the court of appeals is to consider whether the Tax Court committed error.").

Because of the key role of the record on appeal in appellate review, for Tax Court decisions to be afforded the review required by § 7482(a)(1), a document that would be part of the record on appeal of a district court bench trial must be included in the record on appeal of a Tax Court case. Moreover, the Federal Rules of Appellate Procedure provide that *the same rule providing the content of the record on appeal in District Court cases applies to appeals from the Tax Court. See* Fed. R. App. P. 13(d)(1) (providing, in part, that Rule 10, relating to the record on appeal, applies to appeals from Tax Court cases and that "[r]eferences in [that rule] . . . to the district court and district clerk are to be read as referring to the Tax Court and its clerk.").

B. The Record on Appeal from a District Court Case Includes the Original Findings of Fact, Including Those of an Inferior Officer who Heard a Dispositive Matter or Conducted the Trial

Federal Rule of Appellate Procedure 10(a) provides a list of the items that constitute the record on appeal in a district court case:

> (1) the original papers and exhibits filed in the district court;
>
> (2) the transcript of proceedings, if any; and
>
> (3) a certified copy of the docket entries prepared by the district clerk.

Fed R. App. P. 10(a).[4]

> The first part, *original papers, is broadly defined* to include all documents filed with, and presented to, the district court. *The term includes documents presented and filed, whether by a party or by the district judge.* . . . Examples of documents that are classified as original papers include: . . .
>
> – court memoranda . . . ;

[4] Federal Rule of Appellate Procedure 10 also authorizes a truthful agreed statement of the parties "showing how the issues presented by the appeal arose and were decided in the district court. . . . together with any additions that the district court may consider necessary to a full presentation of the issues on appeal . . . approved by the district court and . . . certified to the court of appeals as the record on appeal" to be substituted for the record on appeal defined in Rule 10(a). Fed. R. App. P. 10(d).

> – master's reports . . . ;
>
> – findings of fact and conclusions of law;
>
> – opinions of the court; [and]
>
> – judgments . . . .

20 *Moore's Federal Practice* § 310.10[1] (3d. ed. 1997) (emphasis altered) (footnotes omitted).

Thus, in district court, not only are papers filed by the parties included in the record on appeal, but documents filed by the court – such as memoranda, findings of fact, reports, and opinions – are included as well. *See, e.g., Brown v. United States*, 277 F.2d 201, 202 (8th Cir. 1960) ("detailed memorandum" written by the judge was one of the "original papers of the District Court" and was furnished to Court of Appeals); *United States v. Certain Interests in Property*, 296 F.2d 264, 268 (4th Cir. 1961) (quoting from "unreported statement of . . . findings of fact and conclusions" prepared by district court judge in addition to his reported opinion).

> Even the Commissioner, at oral argument [in *Estate of Kanter*], acknowledged that in *every milieu except that of the Tax Court, the document containing the findings or recommendations of the official conducting the trial are available to a court reviewing the operative decision*. This includes, for example, the report of a federal magistrate judge to a district court responsible for a decision.

Estate of Kanter v. Commissioner, 337 F.3d 833, 874 (7th Cir. 2003) (Cudahy, J., concurring in part and dissenting in part) (emphasis added).

Tax Court STJs are analogous to magistrate judges; in district court, magistrate judges may make findings and recommendations, as well as conduct trials. *See Estate of Smith v. Commissioner*, 638 F.2d 665, 669 (3d Cir. 1981) ("As we see it, the special trial judge acts in a capacity not dissimilar to that of a magistrate in district court."). "[M]agistrate judges and special trial judges enjoy the same constitutional status as 'inferior officers.'" Kathleen Pakenham, *You Better Shop Around: The Status and Authority of Specialty Trial Judges in Federal Tax Cases*, 103 Tax Notes 1527, 1532 (June 21, 2004).

Although district court magistrate judges may be assigned a variety of matters, *see* 28 U.S.C. § 636, nonconsensual district court use of magistrate judges in "dispositive" pretrial matters (those encompassed by 28 U.S.C. § 636(b)(1)(B)) is most analogous to the Tax Court's use of STJs in Rule 183 cases because, in those matters, as in Rule 183 cases, (1) the judicial officer (magistrate or STJ) presides over proceedings that may dispose of the case; (2) consent of the parties is not required for the assignment of the magistrate or STJ to the matter; and (3) the magistrate or STJ makes a recommendation to a judge, not a decision. *Compare* Tax Ct. R. 183 *with* 28 U.S.C. § 636(b)(1). In addition, a magistrate's report and recommendation on a dispositive matter is analogous to a STJ's report under Rule 183. *See Klein v. United States*, 94 F. Supp. 2d 838, 847 (E.D. Mich. 2000) ("Like a federal magistrate judge's report and recommendation to the district court, a Special Trial Judge's proposed findings and opinion become those of the Tax Court once adopted by the presiding Tax Court judge.") (*citing Freytag*, 501 U.S. at 873); *cf. Estate of Kanter*, 337 F.3d at 874 (Cudahy, J., concurring in part and dissenting in part) (referring by analogy in Tax Court

Rule 183 case to "the report of a federal magistrate judge to a district court responsible for a decision.").

The magistrate's report and recommendation in a dispositive matter are included in the record on appeal. In dispositive matters, "the magistrate shall *file his proposed findings and recommendations . . . with the court . . . .*" 28 U.S.C. § 636(b)(1)(C) (emphasis added). Documents filed with the court constitute part of the record on appeal under Federal Rule of Appellate Procedure 10. *See* Fed. R. App. P. 10(a)(1). Federal Rule of Civil Procedure 72 adds that in dispositive pretrial matters heard by a magistrate without consent of the parties, "[a] record shall be made of all evidentiary proceedings before the magistrate judge, and a record may be made of such other proceedings as the magistrate judge deems necessary. The magistrate judge shall *enter into the record* a recommendation for disposition of the matter, including proposed findings of fact when appropriate." Fed. R. Civ. P. 72(b) (emphasis added).

Of course, in Rule 183 cases in Tax Court, the STJ may conduct the entire trial. *See* Tax Ct. R. 183(a). In those cases in which a magistrate judge conducts a district court trial (by consent of the parties) and enters judgment, "an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court." 28 U.S.C. § 636(c)(3); *see also Roell v. Withrow*, 538 U.S. 580, 585 (2003); Fed. R. Civ. P. 73(c). "When functioning in this capacity, magistrate judges are appropriately viewed as proxies for district judges . . . ." A.J. Stephani & Glen Weissenberger, *Federal Civil Procedure 2003 Litigation Manual* 536 (2002). No other judge need be involved in the case at the district court level, so the magistrate judge's findings are

necessarily those subject to review on appeal and Federal Rule of Appellate Procedure 10(a) should apply to determine the contents of the record on appeal, just as it does in other district court cases. *See* Fed. R. App. P. 10(a); *see also Madison v. Parker*, 104 F.3d 765, 767 (5th Cir. 1997) ("We review a judgment rendered by a magistrate judge just as we do a judgment rendered by a district judge.") (*citing* 28 U.S.C. § 636(c)(3)).

Thus, in district court, original findings of fact, including those of magistrate judges, who are analogous to STJs, are included in the record on appeal. Judge Cudahy stated in his separate opinion in *Estate of Kanter*, "in every milieu except that of the Tax Court, the document containing the findings or recommendations of the official conducting the trial are available to a court reviewing the operative decision." *Estate of Kanter*, 337 F.3d at 874 (Cudahy, J., concurring in part and dissenting in part). Most importantly "[t]his includes . . . the report of a federal magistrate judge to a district court responsible for a decision." *Id.* (Cudahy, J., concurring in part and dissenting in part). Given the similarities between the district court's report and recommendation procedure and the Tax Court's procedure in Rule 183 cases, the omission of the STJ's report from the record on appeal violates § 7482 because it prevents appellate review of the Tax Court decisions "to the same extent as decisions of the district courts in civil actions tried without a jury," I.R.C. § 7482(a)(1).

C. Like the District Courts, the Tax Court Cannot Opt to Omit Case Documents from the Record on Appeal

"[U]nder [Federal] Rule [of Appellate Procedure] 10(a), all of the original papers and exhibits filed in the district court are a part of the record on appeal whether or not brought before [the appellate] court." *Chapman v. Rudd Paint & Varnish Co.*, 409 F.2d 635, 638 (9th Cir. 1969). "[A]s a matter of law the district court's record now constitutes the record on appeal." David G. Knibb, *Federal Court of Appeals Manual* § 27.1 (3d ed. 1997). Moreover, "[i]t is not the type of paper submitted but rather the fact of filing which determines whether a particular item will be included in the record." *International Business Machines Corp. v. Edelstein*, 526 F.2d 37, 45 (2d Cir. 1975).

Because the fact of filing a document with the court is the linchpin of inclusion in the record on appeal under Federal Rule of Appellate Procedure 10(a), a court's refusal to file a document raises an issue of usurpation of power. *See id.* In *International Business Machines Corp.*, the Court of Appeals for the Second Circuit stated, "[t]he [trial] judge's refusal to file IBM's papers . . . raise[s] such issue [of usurpation of power], because the *Petitioner is thereby prevented from making a record for purposes of appeal*." *Id.* (emphasis added).

The court added:

> The policy that it is the appealing parties, and not the trial court, who control the issues to be presented on appeal has been embodied in federal practice since the Federal Rules were adopted in 1938. . . .

> On the basis of this policy, *district courts have refrained from exercising any degree of control over the contents of the trial record*, . . . even where parties have petitioned the trial court to exclude certain items from the record.

Id. at 45-46. The court therefore held:

> Since Petitioner has no other means of presenting its arguments to the appellate court – whether as appellant or appellee – save by making the necessary record at the trial level, Judge Edelstein's refusal to file petitioner's motions has constituted an *impermissible interference with petitioner's right to make the record it chooses for purposes of appeal*.

Id. at 46; *cf. United States v. Forness*, 125 F.2d 928, 932 (2d Cir. 1942) (interpreting prior Federal Rule of Civil Procedure 75(h), which governed the record on appeal, as precluding the district court judge from striking certain affidavits from the record, and finding that the rule "permit[ted] him only to add to the record, or to correct it.").

The policy reflected in the Second Circuit's opinion in *International Business Machines Corp.* applies with equal force to the Tax Court. Section 7482(a)(1) provides for review of Tax Court decisions to the same extent as review of district court decisions, and, as explained above, the record on appeal is the linchpin of that review. Furthermore, Federal Rule of Appellate Procedure 10, which was applied in *International Business Machines Corp.*, applies to the Tax Court, as well. *See* Fed. R. App. P. 13(d)(1).

Thus, the Tax Court should not be able to refuse to file a document, so as to make it part of the record, any more

than a district court can. Yet, the Tax Court has done the practical equivalent of that. The Tax Court previously provided complete transparency in cases heard under Rule 183, including service of a copy of the STJ's report on each party and an opportunity to file exceptions to the report with respect to both fact and law. *See* Tax Ct. R. 182(b), (c), 60 T.C. 1149 (1973) (repealed 1984). The prior Tax Court rule also required the STJ to *file* his report, *see id.*, which resulted in its inclusion in the record on appeal under the Federal Rules of Appellate Procedure. *See* Leandra Lederman, *Transparency and Obfuscation in Tax Court Procedure*, 102 Tax Notes 1539, 1540 & n.10 (Mar. 22, 2004).

In 1983, the Tax Court amended its rule without indicating that there were any problems under the existing procedure or otherwise explaining its motivation. *See* Tax Ct. R. 183 note on amendments to rule, 81 T.C. 1069-70 (1983) (amending and renumbering former Rule 182). All that the 1983 note to Rule 183 states with respect to this change is:

> The prior provisions for service of the Special Trial Judge's report on each party and for the filing of exceptions to that report have been deleted. The prior provision for oral argument upon a motion of a party also has been deleted. However, par. (c) provides that the Division to which the case is assigned may direct the filing of additional briefs, receive further evidence, or direct oral argument.

Id., 81 T.C. 1070 (1983).

> There is no public indication why the Tax Court rules and procedures were changed in 1983 to the current system that disadvantages those appealing Tax Court decisions. And, of course, an

> appellate-style procedure such as that typical in all other areas of federal administrative adjudication would facilitate challenges, whether made by the taxpayer or by the Commissioner. The previous procedure may well have been abrogated for exactly this reason.

Estate of Kanter, 337 F.3d at 879 (Cudahy, J., concurring in part and dissenting in part). Given the requirements of § 7482(a)(1), the Tax Court cannot choose to omit from the record on appeal a document, such as the original findings of fact of the trial judge, that would be part of the record on appeal in a district court case.

III. INCLUSION OF THE SPECIAL TRIAL JUDGE'S REPORT IN A TAX COURT RULE 183 CASE IN THE RECORD ON APPEAL IS CONSISTENT WITH THE POLICY OF TRANSPARENCY CONGRESS MANIFESTED WHEN IT CREATED THE BOARD OF TAX APPEALS

In creating the predecessor of the Tax Court, the Board of Tax Appeals, Congress focused on a desire for transparency in its proceedings. For example, one Representative stated:

> I believe that the publicity features as contained in the bill are wholesome, are necessary, and while it may cause embarrassment and inconvenience, perhaps, to an individual here and there, it is for the good of all the taxpayers . . . . No fault can seriously be found in a provision which requires the proceedings of the board of appeals to be public. Let us be frank about that. . . . *The board of appeals and the publicity placed upon its activities are the result of a vicious secrecy system which has grown up in the Treasury Department under the present law.*

65 Cong. Rec. 9549 (1924) (statement of Rep. LaGuardia) (emphasis added). Congress refused to countenance such secrecy when it created the Board of Tax Appeals; the statute creating the Board of Tax Appeals required publicity in the proceedings of the Board and publication of its reports. *See* Harold Dubroff, *The United States Tax Court: An Historical Analysis* 65 & n.96 (1979).

The policy Congress manifested in favor of transparency in Tax Court proceedings continues to be reflected in current law. *See* I.R.C. §§ 7458 ("Hearings before the Tax Court and its divisions shall be open to the public . . . ."); 7461(a) ("Except as provided in subsection (b), all reports of the Tax Court and all evidence received by the Tax Court and its divisions, . . . shall be public records open to the inspection of the public."). The Tax Court's practice in Rule 183 cases is inconsistent with that policy. Judge Cudahy has argued:

> The fact is that this entire process of the Tax Court [in Rule 183 cases] appears designed to extract the efficiencies involved in designating cases to be heard by STJs without having to bear any of the procedural costs traditionally associated with this kind of adjunct decision making (e.g., transparency). I do not believe that the STJ's ultimate assent to the final opinion of the Tax Court is protection enough to the parties.

Estate of Kanter v. Commissioner, 337 F.3d 833, 887-88 (7th Cir. 2003) (Cudahy, J., concurring in part and dissenting in part).

Moreover, the "vicious" nature of a secret system is that it enables its actors to avoid accountability for their actions. Appellate review is a critical part of that accountability.

> Assuming that a judge deciding a case – like anyone making a decision – would not relish the thought of being told that she was wrong, the possibility of having her decision reversed on appeal imposes a cost and becomes a consideration in rendering judgments. In theory, lower-court judges, as a result, would be more likely to choose outcomes solidly based on legal justifications traceable to past decisions or statutes. Thus, appellate review enhances the rationality of lower court decision making by introducing the prospect of institutional censure: certain judicial choices can be constrained by the fact that some options have already been ruled out, or are likely to be ruled out, by a higher court.

David Frisch, *Contractual Choice of Law and the Prudential Foundations of Appellate Review*, 56 Vand. L. Rev. 57, 85 (2003).

Furthermore, appellate oversight of Article I courts by Article III courts may be constitutionally required. The plurality opinion in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), stated, "when Congress assigns [public rights] matters to administrative agencies, or to legislative courts, it has generally provided, and we have suggested that it may be required to provide, for Art. III judicial review." *Id.* at 69 n.23 (*citing Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 455 n.13 (1977)). Professor Richard Fallon has argued, "the central claim of my appellate review theory [is thus]: adequately searching appellate

review of the judgments of legislative courts and administrative agencies is both necessary and sufficient to satisfy the requirements of article III." Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 918 (1988); *see also* Deborah A. Geier, *The Tax Court, Article III, and the Proposal Advanced by the Federal Courts Study Committee: A Study in Applied Constitutional Theory*, 76 Cornell L. Rev. 985, 1026-27 (1991) (arguing that "article III appellate review" of the decisions of a legislative court such as the Tax Court is necessary but not sufficient).

Omission of the STJ's report from the record on appeal is inconsistent with these policies of transparency, oversight, and accountability. In addition, keeping the report secret is inconsistent with Congress' intent to make Tax Court proceedings public. Furthermore, in a Rule 183 case in Tax Court, only the appellate courts can oversee the reviewing judge's actions on the STJ's report. Excluding the report from the record on appeal eliminates that oversight, thereby precluding meaningful appellate review by an Article III court. *See Estate of Kanter*, 337 F.3d at 888 (argument of Judge Cudahy that "by eventually making the STJ's report public (and part of the available record of the Tax Court on appeal), [the Court of Appeals] will have an opportunity to conduct meaningful appellate review.") (Cudahy, J., concurring in part and dissenting in part).

> The correct finding, as near as may be, of the facts of a law suit is fully as important as the application of the correct legal rules to the facts as found. An impeccably "right" legal rule applied to the "wrong" facts yields a decision which is as

> faulty as one which results from the application of the "wrong" legal rule to the "right" facts. . . .
>
> . . . As fact-finding is a human undertaking, it can, of course, never be perfect and infallible. For that very reason every effort should be made to render it as adequate as it humanly can be.

United States v. Forness, 125 F.2d 928, 942-43 (2d Cir. 1942) (footnotes omitted).

CONCLUSION

The judgments of the United States Courts of Appeals for the Seventh Circuit and the Eleventh Circuit should be vacated and the cases remanded so that the report of Special Trial Judge Couvillion can be included in the record on appeal.

Respectfully submitted,

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